SUPREME COURT, U.S.
JUN 29 1966
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 300

LOUIS KAYE, *Petitioner*,

v.

CO-ORDINATING COMMITTEE ON DISCIPLINE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THE NEW YORK COUNTY LAWYERS' ASSOCIATION, AND BRONX COUNTY BAR ASSOCIATION, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the order of the Appellate Division, First Department, of the Supreme Court of the State of New York entered on January 13, 1966, disbarring petitioner from practice as an attorney and counselor-at-law.

OPINION BELOW

The opinion of the court below is reported at 24 App. Div. 2d 345, 266 N.Y.S.2d 69.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). The order of the Appellate Division was

entered on January 13, 1966. On March 31, 1966 the Court of Appeals of the State of New York entered an order denying petitioner leave to appeal from the order of the Appellate Division of January 13, 1966.

QUESTIONS PRESENTED

1. Whether the Fifth Amendment requires the suppression in a disbarment proceeding of self-incriminating evidence obtained under the compulsion of a subpoena and the threat of disbarment for noncompliance with the subpoena.

2. Whether the Fifth Amendment permits a legal presumption of guilt to be drawn in a disbarment proceeding from the attorney's failure to testify.

3. Whether the Fourth Amendment prohibits the use in a disbarment proceeding of evidence obtained by an investigating committee from an attorney's private papers which, after having been stolen, were submitted to the investigating committee.

4. Whether the cumulative effect in a disbarment proceeding of a complaint grounded in extortion, an investigation based upon stolen private papers, the use of self-incriminating evidence obtained under the compulsion of a subpoena and threat of disbarment, the reliance on prejudicial admissions made in the disciplinary committee's investigation while excluding explanatory testimony, and the legal presumption of guilt because of the failure to testify represents such a departure from accepted standards of fairness as to constitute a deprivation of due process under the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, . . .

United States Constitution, Amendment V

No person . . . shall be compelled in any criminal case to be a witness against himself . . .

United States Constitution, Amendment XIV

Section 1 . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

STATEMENT OF CASE

On January 13, 1966, the Appellate Division of the Supreme Court of the State of New York, First Department, entered an order disbarring petitioner from the practice of law (Appendix, p. 6). Petitioner was admitted to practice in the State of New York on May 7, 1924. The disbarment proceeding was instigated by a complaint concerning petitioner's "general behavior" and "practice" (Tr. 794)[1] filed on September 12, 1963, by an attorney named Abraham Gelman, who had formerly been in petitioner's employ, after petitioner had refused his demand for money accompanied by a threat to file a complaint. The complaint was referred to the Co-ordinating Committee on Discipline of the Association of the Bar of the City of New York, the New York County Lawyer's Association and the Bronx County Bar Association (hereinafter "the Co-ordinating Committee") which was authorized by the Appellate Division, First Department, on February 3, 1959, to conduct a continuing examination and study, under the supervision of the presiding justice, of the conduct of attorneys in cases involving personal injury claims.

Upon receiving the complaint, the Co-ordinating Committee initiated an investigation of petitioner (Tr. 795). It interviewed Mr. Gelman a number of times and obtained from him various personal papers of petitioner which he

[1] "Tr." references are to the transcript of testimony before the Referee.

stated he had obtained from petitioner's apartment (Tr. 790-791). These records were not offered to the Co-ordinating Committee when Gelman made his complaint or was first interviewed but were turned over shortly after the first meeting (Tr. 790). They were then used as the basis for obtaining testimony and evidence in the subsequent investigation (Tr. 793). Petitioner advised the Co-ordinating Committee that Gelman had stolen his private records, had threatened to have him disbarred by their disclosure unless petitioner met his demand for the payment of money, and had filed the complaint when petitioner refused to submit to this attempted extortion.

In the course of the investigation, a subpoena was issued which directed petitioner to appear before the Co-ordinating Committee to testify and to produce certain books and records (Appendix, p. 11). Counsel to the Co-ordinating Committee informed petitioner that, in accordance with the practice upheld in *Cohen v. Hurley*, 366 U.S. 117, an additional charge independently sustaining disbarment would be filed if he failed to respond to the Subpoena (Tr. 784, 829). Yielding to the compulsion of the subpoena and the threat of disbarment, petitioner produced the books and records demanded and testified in the secret investigation by the Co-ordinating Committee.

The Co-ordinating Committee, on May 5, 1964, recommended that charges of professional misconduct be presented and on May 11, 1964, the Appellate Division authorized the Committee to institute and prosecute a disbarment proceeding. The Co-ordinating Committee petition, verified May 12, 1964, alleged nine charges of professional misconduct. On July 7, 1964, the Appellate Division appointed a referee to take testimony and report with respect to the Co-ordinating Committee's charges. Petitioner filed an answer, verified July 22, 1964, which denied the charges and asserted privileges against unlawful search and seizure and self-incrimination under the Federal Constitution (Appendix, p. 12). Thereafter rely-

ing on the Fourth, Fifth and Fourteenth Amendments to the Federal Constitution, petitioner filed a motion in the Appellate Division for an order suppressing the use at the hearing before the Referee of the evidence obtained in the Co-ordinating Committee's investigation. This motion was denied on October 29, 1964. (Appendix, p. 7, 11).

At the hearing before the Referee, petitioner renewed on constitutional grounds his objections to the introduction of his testimony in the Co-ordinating Committee's investigation (Tr. 681-697). Selected portions of this testimony were offered by the Co-ordinating Committee as admissions by petitioner and received by the referee (Tr. 699-714, 865). Testimony before the Co-ordinating Committee offered by petitioner was excluded (Tr. 859-867).

The Referee filed his report, dated July 23, 1965, and found substantially all the charges proved. The report stated that the investigation of petitioner was instituted as a result of a complaint which "evidently stemmed from the desire of Gelman to cause trouble to the respondent [petitioner here] because of certain personal grievances" and that, in the course of the investigation, Gelman submitted to the Co-ordinating Committee a number of documents which he claimed had been discarded by petitioner (R. 12).[2] Petitioner claimed these were among the private papers which were stolen from his files (R. 11, 26-27). The referee made no findings with respect to how these private papers were obtained and did not pass upon petitioner's constitutional objections on the ground that the Appellate Division's denial of petitioner's motion to suppress had established the law of the case (R. 13, 26-27).

The Referee's Report twice commented on the fact that petitioner "chose not to testify in this proceeding" (R. 13, 25) and stated that his testimony before the Co-ordinating

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[2] "R" references are to the pages in the Referee's report.

Committee "contains various admissions" (R. 17). This testimony, as well as petitioner's failure to volunteer explanations of certain testimony and charges, was set forth in the Referee's Report and relied upon to support his findings that certain charges had been proved (R. 17, 21, 22, 25, 26).

After the referee's report had been filed, petitioner filed a motion in the Appellate Division to remand the proceeding to the Referee for the purpose of receiving in evidence all petitioner's testimony before the Co-ordinating Committee or, alternatively, to incorporate such testimony in the record before the Appellate Division for consideration in its ruling with respect to the Referee's report. On January 13, 1966, the Appellate Division denied this motion, found petitioner had been guilty of professional misconduct, and ordered that he be disbarred effective February 14, 1966 (Appendix, pp. 10, 6-9).

The Appellate Division's opinion noted that petitioner did not testify at the hearings before the Referee, referred to the "legal presumption" of the truth of adverse testimony as a consequence of "the failure of an attorney to testify in a disciplinary proceeding", and emphasized petitioner's "obligations to take the stand and be cross-examined as to any testimony he might give in attempted explanation of his conduct". The opinion stated (Appendix, p. 2):

> Although respondent had been examined under oath at the inception of the investigation by the Coordinating Committee on Discipline, respondent did not testify on his own behalf at the hearings before the Referee. In *Matter of Wysell*, 10 A D 2d 199, 202, this Court alluded to the consequences of the failure of an attorney to testify in a disciplinary proceeding in the following language:
>
> "Disciplinary proceedings are not criminal proceedings, and the 'refusal to testify raises the legal presumption of the truth of these facts, which must have been known to defendant, and which he failed to contradict' (*Matter of Associ-*

> *ation of the Bar of the City of N.Y. v. Randel*, 158 N.Y. 216, 219.) For [i]f there was any possible statement that the defendant could have made, calculated to explain his conduct and relieve himself from the serious consequences of the facts as disclosed by this record, he should have taken the stand, made a full statement and submitted himself to cross-examination.' (*Matter of Association of the Bar of the City of N.Y. v. Randel, supra*, p. 221.)"
>
> After the Referee's report was filed, respondent moved in this Court to reopen the hearing so as to permit consideration of his testimony before the Co-ordinating Committee. We have denied that motion. It should be noted that respondent had objected to the introduction of that testimony when offered at the hearings before the Referee. As a consequence, only admissions against interest were introduced in evidence. But even if the entire testimony were before the Referee, that would still not be a proper or adequate substitute for respondent's obligations to take the stand and be cross-examined as to any testimony he might give in attempted explanation of his conduct.

Petitioner's motion for leave to appeal to the Court of Appeals was denied on March 31, 1966. On April 19, 1966, the Appellate Division amended its disbarment order of January 13, 1966, to add the following (Appendix, pp. 9-10):

> Upon the matter there were presented and necessarily passed upon questions under the Constitution of the United States, viz., whether respondent's rights under the Fourth, Fifth and Fourteenth Amendments were violated. The Court held that they were not.

REASONS FOR GRANTING THE WRIT

Petitioner submits that in three separate respects the proceedings below violated important rights guaranteed by the Fourth and Fifth Amendments to the Federal Constitution and, in addition, that the sum of the inequities which permeated the proceeding violated the due process requirement of the Fourteenth Amendment. Thus four

grounds are relied upon for granting the writ of certiorari: (1) the refusal to suppress compelled self-incriminating evidence in the disbarment hearing violates the Fifth Amendment privilege; (2) the "legal presumption" of the truth of evidence because of an attorney's failure to testify in the disbarment hearing is an unconstitutional penalty for exercise of the Fifth Amendment privilege; (3) the use of an attorney's stolen private papers as the starting point for a disbarment investigation is an unreasonable search in violation of the Fourth Amendment; and (4) the proceeding in its entirety beginning with the extortion-tainted complaint and concluding with the legal presumption of guilt from the exercise of a constitutional privilege so offends traditional concepts of fairness as to constitute a deprivation of due process under the Fourteenth Amendment.

1. Privilege Against Self-Incrimination Applies to Disbarment by State Court.

This Court's decision in *Malloy v. Hogan*, 378 U.S. 1, that "[t]he Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement", undermines the authority of *Cohen v. Hurley*, 366 U.S. 117, upon which the procedure followed by the Co-ordinating Committee was based, and makes clear that the privilege is invaded by the use in state criminal proceedings of coerced, self-incriminating evidence and by the imposition in such proceedings of a penalty for the accused's failure to testify. *Boyd v. United States*, 116 U.S. 616; *Griffin v. California*, 380 U.S. 609.

Although the Court has never decided the precise question whether disbarment is a punishment which will justify invoking the privilege against self-incrimination, the decisions of the Court holding the privilege applicable to civil forfeitures (*Boyd v. United States, supra; Lees v. United States*, 150 U.S. 476) and holding exclusion from one's ordinary avocation to be criminal in nature and subject to

the Constitution's prohibitions with respect to bills of attainder and *ex post facto* laws (*Ex Parte Garland*, 4 Wall. 333; *Cummings v. Missouri*, 4 Wall. 277; *United States v. Lovett*, 328 U.S. 303) are highly persuasive that disbarment is within the compass of the Fifth Amendment's self-incrimination protection and that the standards developed in other contexts with respect to compelled, self-incriminating evidence and the imposition of penalties for reliance on the privilege are applicable in disbarment proceedings.

In *Boyd v. United States*, *supra*, the privilege was held applicable in a civil proceeding for the forfeiture of goods under the customs laws and in *Lees v. United States*, *supra*, it was held applicable in a civil action to recover a $1000 penalty for violation of alien labor restrictions. In *Ex Parte Wall*, 107 U.S. 265, 271, which involved the disbarment of an attorney from a federal court upon proof of participation in a lynching, the Court observed that "the petitioner was not required to criminate himself by answering under oath."

With respect to whether disbarment may be considered equivalent to criminal punishment, the Court in *Ex Parte Garland*, 4 Wall. at 377, in holding invalid as a bill of attainder a statute which denied an attorney the right to practice, stated that "exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct." In *Ex Parte Wall*, *supra*, the opinion of the Court acknowledged "that an attorney's calling or profession is his property, within the true sense and meaning of the Constitution" (p. 289) and the dissenting (on other grounds) opinion of Mr. Justice Field remarked (p. 318) that "To disbar an attorney, is to inflict upon him punishment of the severest character." In *Cummings v. Missouri*, *supra*, provisions of the Missouri Constitution were held invalid as a bill of attainder and *ex post facto* law because "they produce the same result [as criminal statutes] * * * by depriving such persons of the right to hold certain offices and trusts, and to pursue their

ordinary and regular avocations. This deprivation is punishment * * *". 4 Wall. at 327. And in *United States v. Lovett, supra,* which also held a statute invalid as a bill of attainder, the Court held "This permanent proscription from any opportunity to serve the Government is punishment * * *" 328 U.S. at 316. The effects of disbarment have recently been described by Mr. Justice Black in his dissent in *Cohen v. Hurley,* 366 U.S. at 147, as so severe as to entitle a lawyer to "the full benefit of the 'law of the land' ". In dissenting in the same case Mr. Justice Douglas stated (pp. 153-154):

> Taking away a man's right to practice law is imposing a penalty as severe as a criminal sanction, perhaps more so.

The test of criminal penalties for the purpose of bills of attainder and *ex post facto* laws would seem to be no more lenient than for the privilege against self-incrimination and disbarment would appear to be sufficiently penal in nature to be within the protection of the Fifth Amendment privilege. It follows, therefore, that the use in the proceeding below of evidence obtained by coercion and the "legal presumption" of guilt based upon petitioner's failure to testify constituted invasions of the privilege contrary to *Boyd v. United States,* 116 U.S. 616, and *Griffin v. California,* 380 U.S. 609.

2. The Use of Coerced Self-Incriminating Evidence in Disbarment Proceeding Violated Fifth Amendment.

The *Boyd* case, which has been a touchstone of the privilege against self-incrimination from the time of its announcement in 1886 to the present day, held unconstitutional the compulsory extortion of a person's private business papers and their use to prove a forfeiture of his goods. Pursuant to a customs statute, a notice under court order was directed to claimants of imported goods held for forfeiture requiring them to produce a pertinent invoice or have the allegations supporting the notice taken

as confessed. The invoice was produced under protest and admitted in evidence in the forfeiture proceeding over objection. The judgment of forfeiture which followed was reversed because "any forcible and compulsory extortion of a man's own testimony or his private papers to be used as evidence * * * to forfeit his goods is within the condemnation of" the Fourth and Fifth Amendments. 116 U.S. at 630.

The subpoena in the present case recited that petitioner would "be deemed guilty of contempt of Court" if he failed to comply and was buttressed by the threat of disbarment in accordance with *Cohen v. Hurley*, 366 U.S. 117, if he refused to testify or produce his private records in reliance upon the Fifth Amendment privilege. The compulsion of the subpoena here was obviously no less than the notice to produce in *Boyd* and the production of evidence pursuant to its mandate no less coerced. The use of the incriminating testimony thus obtained as evidence for disbarment is equally condemned for the privilege protects not only the refusal to disclose self-incriminating statements but also prevents the use of self-incriminating statements elicited by compulsion. See *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 57. The protection of the privilege was "intended to relieve claimants of the necessity of making a choice between incriminating themselves and risking serious punishments for refusing to do so." *Albertson v. SACB*, 382 U.S. 70, 76. Thus, "abuses may be corrected * * * by excluding from subsequent prosecutions evidence improperly obtained." *In Re Groban*, 352 U.S. 330, 334. Permitting the introduction of incriminating evidence obtained by coercion is, therefore, a violation of the privilege whether the compulsion is by "compliance with a subpoena to produce one's papers" (*Schmerber v. State of California*, No. 658, October Term 1965, decided June 20, 1966, slip opinion, p. 6) or "whatever may have been the character of the compulsion." *Wan v. United States*, 266 U.S. 1, 14-15; *Bram v. United States*, 168 U.S. 532; *Miranda v. State of Arizona*, No. 759, October Term

1965, decided June 13, 1966. The failure to suppress the evidence obtained by the Co-ordinating Committee from petitioner in compliance with its subpoena and threat of disbarment upon failure to comply, by denial of his motion to suppress, deprived him of the Fifth Amendment's protection. See *United States v. Blue*, 16 L. Ed. 2nd 510.

3. "Legal Presumption" of Truth of Adverse Evidence for Failure To Testify Violated Fifth Amendment.

The untoward view of the court below to petitioner's failure to testify is evidenced by its quotation from its earlier decision that "Disciplinary proceedings are not criminal proceedings" and that a failure to become a witness "raises the legal presumption of the truth" of adverse evidence and by its reference to petitioner's "obligations to take the stand and be cross-examined" (Appendix, p. 2).

Since the punishment of disbarment should be considered a criminal penalty, the adverse attitude of the court and "legal presumption" of guilt resulting from petitioner's failure to testify before the Referee imposed an impermissible penalty on the exercise of the privilege against self-incrimination and constituted an unconstitutional denial of its protection. In *Malloy v. Hogan*, 378 U.S. at 8, the Court made clear that application of the Fifth Amendment standards to the Fourteenth Amendment precluded the States from penalizing the exercise of "the right of a person to remain silent". Thus, the Court held in *Griffin v. California*, 380 U.S. 609, 614, that adverse comment by a court or prosecutor upon the refusal to testify is repugnant to the Fifth Amendment, since "[i]t is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." The "legal presumption" of guilt by the court below is patently a greater penalty than the adverse comments to the jury condemned in *Griffin v.*

California, supra, and deserves the same condemnation. "The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent * * * to a confession of guilt" and "no inference of guilt was possible from the claim" of the privilege. *Slochower v. Board of Education,* 350 U.S. 551, 557, 559.

Cohen v. Hurley, supra, was relied upon in the proceedings below to justify the compulsory production of incriminating evidence under threat of disbarment and undoubtedly was thought to permit adverse inferences to be drawn from petitioner's failure to testify in the disbarment hearing. But the unequivocal interpretation of the Fifth Amendment to preclude the imposition of any penalty for invoking the self-incrimination privilege (*Griffin v. California; Boyd v. United States*) casts serious doubt on the continued vitality of *Cohen v. Hurley.* The importance of resolving this doubt is evidenced by the Court's granting the petition for a writ of certiorari in *Spevack v. Klein,* No. 944, October Term 1965, which presents the question whether disbarment may be decreed for refusal to testify in reliance on the self-incrimination privilege. The present case presents the almost identical question whether testimony may be compelled by threat of disbarment, as well as the closely related question whether the penalty of an adverse presumption may be imposed because of failure to testify. These important questions under the Fifth Amendment as applied to the States through the Fourteenth Amendment should be resolved.

4. Evidence in Disbarment Proceeding Should Have Been Suppressed as Obtained by Unreasonable Searches.

The compulsory production of petitioner's personal records to incriminate him and the use of his stolen private papers by the Co-ordinating Committee to further its investigation present questions of whether they were

unreasonable searches in violation of the Fourth Amendment which required their exclusion as evidence in state proceedings under *Mapp v. Ohio*, 367 U.S. 643. Under *Boyd v. United States, supra*, which held the compulsory production of papers to obtain evidence for the forfeiture of property to be an unreasonable search and seizure in violation of the Fourth Amendment, as well as a violation of the Fifth Amendment, the compulsory production of petitioner's private papers in the present case would appear to be an unreasonable search under the Fourth Amendment. Although *Burdeau v. McDowell*, 256 U.S. 465, looks the other way, the direction of more recent decisions is that the guarantees of the Fourth Amendment were violated when the Co-ordinating Committee, as an agent of the court, obtained petitioner's private papers stolen by Gelman and used them for evidentiary purposes against petitioner.

The holding of *Burdeau v. McDowell, supra*, that papers stolen by a private individual were admissible in evidence where the federal government did not participate in the wrongdoing, appears to have been eroded by this Court's decision in *Elkins v. United States*, 364 U.S. 206, which discarded the so-called "silver platter" doctrine and held that evidence obtained by state officers during a search that would have been illegal under the Fourth Amendment if conducted by federal officials was inadmissible in a federal prosecution. Thus state action, illegal under federal standards, was held to have contaminated the evidence for federal proceedings without any participation in prohibited conduct by federal officials. In an earlier decision, *Rea v. United States*, 350 U.S. 214, the use in a state court of evidence seized by federal officials in violation of federal law was condemned. And in *Abel v. United States*, 362 U.S. 217, 226, the opinion of the Court, although holding the facts to be otherwise, recognized that "the deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts". Long ago, an

involuntary confession obtained outside the United States by officers of a foreign nation was excluded in a federal prosecution. *Bram v. United States,* 168 U.S. 532.

The evidentiary use of stolen papers by state officers would appear to constitute state collaboration in the prohibited activity and, therefore, unconstitutional state action (Cf. *Shelley v. Kraemer,* 334 U.S. 1; *Burton v. Wilmington Parking Authority,* 365 U.S. 715; *Bell v. Maryland,* 378 U.S. 226 (concurring opinion); *United States v. Price,* 383 U.S. 787, and *United States v. Guest,* 383 U.S. 745), particularly where the stolen papers were not submitted initially but were subsequently obtained by the Co-ordinating Committee in pursuance of its investigation. The use as evidence of these stolen papers or the fruits of their disclosures cannot be upheld "without making the courts themselves accomplices in wilful disobedience of law." *McNabb v. United States,* 318 U.S. 332, 345. The dissenting opinion by Mr. Justice Brandeis, concurred in by Mr. Justice Holmes, in *Burdeau v. McDowell,* 256 U.S. 465, 477, condemned the evidentiary use of papers stolen by a private individual and turned over to federal officials, stating "Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play." It is submitted that these minority views of two generations ago should become the opinion of the Court today.

5. Proceedings Violated Due Process Clause of Fourteenth Amendment.

Whether or not the self-incrimination and unlawful search and seizure prohibitions of the Fourth and Fifth Amendments have been violated, the sordid beginnings of the Co-ordinating Committee's investigation and the basic unfairness which pervaded the proceedings resulting in disbarment, including the Co-ordinating Committee's *ex parte* investigation, the hearings before the Referee, and the adjudication of the Appellate Division offend the due

process standards of the Fourteenth Amendment. The proceedings which culminated in the disbarment order departed so radically from concepts of fundamental fairness as to constitute the deprivation of due process.

The disbarment proceedings were infected by their malicious inception resulting from petitioner's refusal to yield to extortion, the Co-ordinating Committee's apparent solicitation from Gelman of the production of petitioner's stolen private papers, the *ex parte* investigation predicated upon Gelman's malevolent complaint and the stolen papers, the coercion of petitioner to produce incriminating evidence for his own disbarment under threat of contempt and disbarment for failure to comply, the filing of charges on the basis of an investigation so commenced and evidence so obtained, the refusal to suppress the prejudicial evidence so obtained in the hearings on the charges, the rejection of petitioner's effort to have the court or the referee consider his explanatory testimony in the Co-ordinating Committee's investigation after so-called "admissions" were admitted over his objections, and the court's "legal presumption" of guilt based on petitioner's failure to testify in the hearings before the Referee.

It is submitted that this extraordinary combination of circumstances constituted a denial of due process. Although standards of due process under the Fourteenth Amendment are not susceptible of precise definition, procedures unduly offensive to the sense of fairness inherent in our traditional concepts of liberty and respect for individual rights and conduct which shocks the common understanding of decency and fair play violate its requirements. From its unsavory inception to its culmination in penalizing petitioner both from words out of his own mouth and for his not having spoken, the disbarment proceeding violated the fundamental fairness standard of the due process clause of the Fourteenth Amendment. Cf. *Rochin v. California*, 342 U.S. 165; *Rogers v. Richmond*, 365 U.S. 534; *Raley v. Ohio*, 360 U.S. 423.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

OPINION OF SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

[January 13, 1966]

Per Curiam:

The petition herein alleged that respondent had been guilty of professional misconduct as set forth in nine separate charges. After hearings, a Referee reported that eight of the charges had been sustained. Charge No. 4, which the Referee dismissed, involved the compromise of infants' claims without court order. The Referee's report should be confirmed except as to his conclusion on Charge No. 4, which in our opinion should also have been sustained.

The charges included the "farming out" of negligence cases — in which respondent had been retained on a contingent fee basis — under arrangements whereby respondent obtained loans or advances on his 50% share of the fees, without regard to the services or responsibility of the respondent in the cases (Charge No. 1); conversion of a client's funds (Charge No. 2); failure to remit within 15 days, as required by Special Rule IV(4)(a), settlement funds to personal injury claimants (Charge No. 3); compromise of infant claims without court order (Charge No. 4); failure to file Statements of Retainer (Charge No. 5); failure to file closing statements (Charge No. 6); failure to maintain a special account for the deposit of settlement funds (Charge No. 7); harboring a disbarred lawyer in respondent's law office (Charge No. 8); and failure to uphold the honor and dignity of the profession by the use of profanity and the addressing of a racial epithet to a witness at the close of a matrimonial action after the presiding justice had left the courtroom (Charge No. 9).

Although respondent had been examined under oath at the inception of the investigation by the Coordinating Committee on Discipline, respondent did not testify on his own behalf at the hearings before the Referee. In *Matter of Wysell*, 10 AD2d 199, 202, this Court alluded to the consequences of the failure of an attorney to testify in a disciplinary proceeding in the following language:

> 'Disciplinary proceedings are not criminal proceedings, and the 'refusal to testify raises the legal presumption of the truth of these facts, which must have been known to defendant, and which he failed to contradict' (*Matter of Association of the Bar of the City of N.Y. v. Randel*, 158 N.Y. 216, 219.) For '[i]f there was any possible statement that the defendant could have made, calculated to explain his conduct and relieve himself from the serious consequences of the facts as disclosed by this record, he should have taken the stand, made a full statement and submitted himself to cross-examination.' (*Matter of Association of the Bar of the City of N.Y. v. Randel, supra*, p. 221.)"

After the Referee's report was filed, respondent moved in this Court to reopen the hearing so as to permit consideration of his testimony before the Co-ordinating Committee. We have denied that motion. It should be noted that respondent had objected to the introduction of that testimony when offered at the hearings before the Referee. As a consequence, only admissions against interest were introduced in evidence. But even if the entire testimony were before the Referee, that would still not be a proper or adequate substitute for respondent's obligations to take the stand and be cross-examined as to any testimony he might give in attempted explanation of his conduct.

The testimony under Charge No. 1 revealed that respondent indulged in the practice of accepting contingent fee retainers in accident cases with the intention of for-

warding those cases to other attorneys for handling under arrangements whereby respondent would obtain immediate financial benefits for himself in the form of loans or advances against his agreed share — 50% of the net fees resulting from trial or settlement of the cases by the forwardee-attorneys — with little or no service and responsibility to be rendered or assumed by respondent. During the 15-month period, July 1, 1959 — September 30, 1960, respondent transferred 15 such negligence cases to one firm of attorneys; 37 cases to another firm; and 38 cases to a third attorney (34 of these cases had been re-transferred from the second set of attorneys). In each instance, when respondent "farmed out" these negligence cases, he obtained loans of money from the attorneys to whom he had transferred the cases, to be repaid from respondent's share in the net fees to be realized. Moreover, the cases were transferred to new counsel without any prior notice by respondent to his clients or any inquiry by him concerning their wishes in the matter.

The Referee found that in "farming out" negligence cases, under arrangements whereby respondent was to share in 50% of the fees, respondent violated Canon 34 of the Canons of Professional Ethics of the New York State Bar Association and Rule V of the Special Rules of this Court. That Canon and our Rule V interdict the division of fees for legal services upon any basis other than a division of services or responsibility.

In *Greenwald v. Zyvith*, 23 A D 2d 201, the Court in discussing Canon 34 said (pp. 203, 204):

> ". . . This canon is designed, in part, to keep the profession of law from becoming an ordinary business. It gives substance to the admonition of canon 12 that 'the profession is a branch of the administration of justice and not a mere money-getting trade.' Canon 34 thus condemns both the 'finder's fee', payable regardless of the service performed

> or responsibility assumed by a forwarding lawyer, as well as the unearned divided fee, taken by an attorney who has assumed the role of an 'attorney of record' but who, in fact, has neither rendered service nor assumed responsibility in the handling of the case (Drinker, Legal Ethics [1953 ed.] 186)."

In *Matter of Connelly, Etc.*, 18 AD2d 466, 469, this Court held that lawyers are expected to adhere to the dictates of the Canons "and any substantial breach thereof is considered as professional misconduct which may be the subject of disciplinary action in accordance with the provisions of said subdivision 2 of Section 90 of the Judiciary Law."

There is no question that respondent's conduct with respect to the "farming out" of negligence cases was in clear violation of Canon 34 and our Special Rule V. In addition, we strongly disapprove of such trafficking in negligence cases as if dealings were being had in commodities in ordinary business. Nor will this Court condone transactions which in effect constitute the pledging of contingent fees in negligence cases as security for the payment of loans or advances. Respondent's conduct with respect to the "farming out" of the negligence cases constituted serious professional misconduct.

It serves no purpose to discuss in detail the evidence upon which the other charges were clearly sustained. Conversion of a client's funds is serious misconduct; (*Matter of O'Doherty*, 14 AD2d 4 affd. 11 NY2d 1028) even where the amount may be comparatively small (*Matter of Longo*, 274 App. Div. 14). Failure to comply with the Special Rules of this Court governing the conduct of attorneys as to filing Statements of Retainer, Closing Statements and timely remission of settlement funds to clients constitutes professional misconduct. (*Matter of Kiley*, 22 AD2d 527, 528.) Respondent's association with, and employment of, the disbarred attorney, Sohmer, in respondent's law office is the type of conduct which re-

ceived condemnation by this Court in *Matter of Lerner*, 270 App. Div. 602, 603.

With respect to Charge No. 4, involving the compromise of infants' claims without court order, this Court has ruled that the failure to obtain judicial approval of infants' settlements is grievous misconduct. (*Matter of Feldman*, 17 AD2d 553, 558.) The Referee concluded that since the accident, in which the infants mentioned in the Charge were injured, occurred in New Jersey and the case was settled with a New Jersey Casualty Company, respondent could be excused from following the procedure for settling infants' claims provided for in our Special Rule VI. There is nothing in that Rule, nor in CPLR 1207, 1208, which restricts its application to New York accidents. Since no action was commenced in New Jersey, the settlement of the claims in New York involving New York infants required that the compromise be approved by a court. Respondent was not permitted to rely on the carrier's practice to omit obtaining a compromise order (*Matter of Feldman, supra*, at p. 557). Nor did the fact that the accident occurred in New Jersey excuse the failure by respondent to file Statements of Retainer and Closing Statements with respect to the claims of these infants.

The evidence before the Referee, and the findings which we confirm, demonstrate, in their cumulative effect, serious professional misconduct on the part of respondent. What is more, respondent did not testify and attempt to explain his conduct or show why he should be relieved from the grave consequences which might flow from the facts demonstrated by the record.

In determining the measure of disciplinary sanction to be meted out, we have, of necessity, considered respondent's past disciplinary record. Respondent was admitted to the Bar by the Appellate Division, Second Department, on May 7, 1924. In January, 1928, respondent was disbarred by the Second Department, after he

had pleaded guilty to a felony count in an indictment in the U.S. District Court for the Eastern District of New York charging him with using the mails to defraud casualty companies into paying money to fraudulent claimants for alleged personal injuries (*Matter of Kaye*, 222 App. Div. 829). In June, 1935, respondent was reinstated by the Second Department, after he had received a Presidential pardon. (*Matter of Kaye*, 243 App. Div. 615.)

In April, 1953, this Court suspended respondent from practice for one year on a charge of knowingly issuing bad checks (*Matter of Kaye*, 281 App. Div. 508). Our Per Curiam in that case noted that:

> "Respondent has previously been admonished with respect to his conduct and professional associations. He appears not to have taken the admonition sufficiently seriously."

Respondent was reinstated by this Court on September 1, 1954.

Despite these prior difficulties, respondent has evidently continued to violate the rules of correct professional conduct in grave respects. His conduct strongly suggests the likelihood that he will continue to bring the profession into disrepute. Under the circumstances, the respondent should be disbarred.

ALL CONCUR

ORDER OF DISBARMENT
[Entered January 13, 1966]

Peter R. Kaminer, Magnus Lipton and Abraham Shamos, as members of the Co-ordinating Committee on Discipline of The Association of the Bar of the City of New York, The New York County Lawyers' Association and Bronx County Bar Association, by Henry Weiner, Esq., their attorney, having presented to this Court on

the 26th day of May, 1964, a petition containing charges of professional misconduct against the above-named respondent, Louis Kaye (admitted as Louis Kaminetsky), who was admitted to practice as an attorney and counselor-at-law in the State of New York, on the 7th day of May, 1924, at a term of the Appellate Division of the Supreme Court, Second Judicial Department, and having petitioned the Court to take such action upon such charges as in the judgment of said Court justice may require; and the Respondent having appeared herein by attorney, Arthur F. Lamanda, Esq., and having interposed an answer to said petition, duly verified the 22nd day of July, 1964, and the Court having duly made and entered an order on the 7th day of July, 1964, appointing Raphael P. Koenig, Esq., as Referee herein to take testimony in regard to said charges and to report to this Court his opinion thereon; and a hearing, pursuant to said order of reference having been duly held before the said Referee and the said Referee having duly heard the testimony and proofs tendered by the parties hereto, and having thereafter rendered his report thereon to this Court, which report was dated the 23rd day of July, 1965, and was filed in the office of the Clerk of this Court on the 27th day of July, 1965;

And thereafter and on the 6th day of October, 1964, respondent having moved this Court for an order dismissing Charges 8 and 9 for lack of jurisdiction, suppressing the use at the hearing before the Referee of the evidence used as a basis of the allegations set forth in Charges 2 to 8 inclusive of the petition, and for other relief, which motion was denied in all respects by order of this Court entered on October 29, 1964;

And the petitioner thereafter and on the 19th day of October, 1965, having moved for an order confirming in part and disaffirming in part the Referee's report and adjudging the respondent guilty of professional misconduct and that the Court take such action herein as it might deem just and proper; and the respondent having

moved for an order confirming in part and disaffirming in part the Referee's report and dismissing the charges against respondent in all respects;

Now, upon reading the petition of the Co-ordinating Committee on Discipline, verified the 12th day of May, 1964, the affidavit of Henry Weiner, Esq., annexed thereto, sworn to the 12th day of May, 1964, the notice of presentation of said petition dated the 12th day of May, 1964, with proof of due service thereof upon the respondent, the order of this Court, dated the 7th day of July, 1964, appointing Raphael P. Koenig, Esq. as Referee herein, all of which papers were duly filed in the office of the Clerk of this Court on the 7th day of July, 1964, the answer of the respondent to said petition, verified the 22nd day of July, 1964, the report of Raphael P. Koenig, Esq., the Referee herein, dated the 23rd day of July, 1965, together with the testimony taken by him and the exhibits offered in evidence, which were filed in the office of the Clerk of this Court on the 27th day of July, 1965; and upon reading and filing the notice of motion for an order confirming in part and disaffirming in part the report of the Referee and adjudging the respondent guilty of professional misconduct, dated the 13th day of September, 1965, with proof of due service thereof, and the notice of motion for an order confirming in part and disaffirming in part the report of the Referee and dismissing the charges against respondent, dated the 18th day of October, 1965, with proof of due service thereof, and after hearing Mr. Angelo T. Cometa for the motion to confirm in part and disaffirm in part the Referee's report and adjudging the respondent guilty of professional misconduct and Mr. Matthew A. Campbell for the motion to confirm in part and disaffirm in part the Referee's report and dismiss the charges against respondent in all respects, and due deliberation having been had thereon; and the Court having unanimously found and decided that the respondent has been guilty of professional misconduct in his office of attorney and counsel-at-law, it is hereby unanimously

Ordered that the said Louis Kaye (admitted as Louis Kaminetsky) be and he hereby is disbarred from practice as an attorney and counsel-at-law in the State of New York effective February 14, 1966; and it is further unanimously

Ordered that the name of said Louis Kaye (admitted as Louis Kaminetsky) be struck from the roll of attorneys and counselors-at-law in the State of New York effective February 14, 1966; and it is further unanimously

Ordered that the said Louis Kaye (admitted as Louis Kaminetsky) be and he hereby is commanded to desist and refrain from the practice of the law in any form, either as principal or agent, clerk or employee of another, effective February 14, 1966; and it is further unanimously

Ordered that the said Louis Kaye (admitted as Louis Kaminetsky) be and he hereby is forbidden to appear as an attorney or counselor-at-law before any court, judge, justice, board, commission or other public authority, effective February 14, 1966; and it is further unanimously

Ordered that the said Louis Kaye (admitted as Louis Kaminetsky) be and he hereby is forbidden to give to another an opinion as to the law or its application or any advice in relation thereto effective February 14, 1966.

PORTION OF ORDER AMENDING DISBARMENT ORDER

[Entered April 19, 1966]

It is ordered that the said motion be and the same hereby is granted to the extent of amending the order of disbarment of this Court entered on January 13, 1966, to recite the following: "Upon the matter there were pre-

sented and necessarily passed upon questions under the Constitution of the United States, viz., whether respondent's rights under the Fourth, Fifth and Fourteenth Amendments were violated. The Court held that they were not." In all other respects, the motion is denied.

ORDER DENYING MOTION TO REMAND, ETC.
[Entered January 13, 1966]

The above-named respondent having moved this Court for an order remanding this proceeding to the Referee for the purpose of receiving into evidence the testimony of respondent given before the Co-ordinating Committee on Discipline and permitting the parties to file additional briefs to the Referee, or, in the alternative, directing that all of respondent's aforesaid testimony be incorporated in the record before this Court and permitting the parties to file supplemental briefs to this Court,

Now, upon reading and filing the notice of motion, dated October 20, 1965, with proof of due service thereof, and the affidavit of Louis Kaye, duly sworn to the 21st day of October, 1965, in support of said motion, and the affidavit of Angelo T. Cometa, duly sworn to the 22nd day of October, 1965, in opposition thereto, and after hearing Mr. Matthew A. Campbell for the motion, and Mr. Angelo T. Cometa opposed,

It is ordered that the said motion be and the same hereby is denied in all respects.

[SUBPOENA]

The People of the State of New York

To: LOUIS KAYE, ESQ.
42 Broadway
New York 4, N. Y.

Greeting:

We command you, That all business and excuses being laid aside, you appear and attend before the Co-ordinating Committee on Discipline at 100 Centre Street, Room 1535, in the City of New York, State of New York on the 10th day of January, 1964 at 2:00 o'clock in the afternoon, and at any adjourned date to testify and give evidence in a preliminary investigation of Practices of Attorneys in Personal Injury Claims, now being conducted pursuant to the order of the Appellate Division of the Supreme Court of the State of New York in and for the First Judicial Department, and that you bring with you, and produce at the time and place aforesaid, the following:

> your legal and correspondence files with respect to personal injury claims prosecuted on behalf of clients in those cases where a check in settlement of such claim, or in payment thereof after verdict, was issued in 1960, 1961, 1962 or in 1963, together with your distribution checks to clients in such cases, together with copies of statements of retainer and closing statements filed in such cases,

now in your custody, and all other deeds, evidences and writings, which you have in your custody or power, concerning the premises. And for a failure to attend, you will be deemed guilty to a contempt of Court,

Witness, Honorable BERNARD BOTEIN, Presiding Justice of the Appellate Division of the Supreme Court

of the State of New York, First Department, at New York, N.Y., the 9th day of December, 1963.

/s/ VINCENT A. MASSI,
Clerk of said Court

/s/ HENRY WEINER
Attorney for Co-ordinating Committee on Discipline

EXCERPTS FROM REPORT OF REFEREE
[Dated July 23, 1965]

The answer of the respondent denies each and every allegation of the charges and sets up as an affirmative defense that he is the victim of a plot on the part of two persons known to the petitioner. These persons extracted his private papers against his will and said papers have become the source of knowledge and information upon which the petitioner proceeded. Consequently the proceeding is in violation of his constitutional rights, privileges and immunities. Said rights are further violated by the ex parte examination of witnesses and others. He further alleges that he was not afforded an opportunity to invoke any constitutional privilege and appeared and gave testimony in order not to be charged with contempt or lack of cooperation. He asserts that he has never waived "his constitutional privileges as a citizen and invokes the rights, privileges and immunities afforded to him under the Bill of Rights, Article 14 of the United States Constitution and under article 1, Section 6 of the New York State Constitution and all other provisions therein, whereby citizens are protected against the invasion of their constitutional rights against self-incrimination and against the unlawful search and seizure of private papers and other information without a search warrant having been duly obtained." He contends "that he is entitled to the same general immunities as any citizen of the United States, and therefore invokes said rights and privileges and immunities in this proceeding."

* * *

Upon the receipt of the charges herein, respondent moved for an order at a term of the Appellate Division which requested, among other relief, for an order suppressing the use at the hearing before the Referee of the evidence used as a basis of the allegations set forth in Charges 1 to 8 inclusive, on the ground that such use at the hearing would be a deprivation of the rights of the petitioner arising under the Federal Constitution, under the New York State Constitution, and under the New York State Bill of Rights. The motion was denied in all respects on October 29, 1964.

An action was brought in the United States Court for the Southern District of New York and in connection therewith a stay of the proceedings herein was requested until such time as that court determined the legality of the means by which certain information and data were obtained (S.M. p. 718). That stay was denied (S.M. p. 729). It is assumed that both in the Appellate Division and the United States District Court the contentions of the respondent were similar to those urged before me. While I agree with the decisions and would decide that no violation of any rights have occurred, I feel that the law of the case has been established and that there is no constitutional question which I have to consider.

* * *

TELEGRAM
[Dated March 31, 1966]

MOTION FOR LEAVE TO APPEAL AND FOR A STAY DENIED RAYMOND J CANNON CLERK COURT OF APPEALS ALBANY NY

LIBRARY
SUPREME COURT, U. S.

FILED
AUG 27 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 300

In the Matter of

LOUIS KAYE,

Petitioner,

—against—

CO-ORDINATING COMMITTEE ON DISCIPLINE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT

RESPONDENT'S BRIEF IN OPPOSITION

ANGELO T. COMETA
43 West 43rd Street
New York, New York 10036
Attorney for Respondent

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 300

In the Matter of

LOUIS KAYE,

Petitioner,

—against—

CO-ORDINATING COMMITTEE ON DISCIPLINE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT

RESPONDENT'S BRIEF IN OPPOSITION

Preliminary Statement

This is a petition for a writ of certiorari to review the order of the Appellate Division of the Supreme Court of the State of New York, First Department, entered on January 13, 1966, disbarring petitioner from practice as an attorney and counselor-at-law.

Statutes, Rules and Orders

The Judiciary Law of the State of New York, Section 90, Admission to and removal from practice by appellate division:

> 2. The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice . . .
>
> • • • • •
>
> 6. Before an attorney or counsellor-at-law is suspended or removed as prescribed in this section, a copy of the charges against him must be delivered to him personally within or without the state or, in case it is established to the satisfaction of the presiding justice of the appellate division of the supreme court to which the charges have been presented, that he cannot with due diligence be served personally, the same may be served upon him by mail, publication or otherwise as the said presiding justice may direct, and he must be allowed an opportunity of being heard in his defense . . .

Special Rules of the Appellate Division, First Department, Regulating Conduct of Attorneys:

Rule IV. Claims or actions for personal injuries, property damage, wrongful death, loss of services resulting from personal injuries and claims in connection with condemnation or change of grade proceedings. (1) Statements as to retainers; blank retainers.

(a) Every attorney who in connection with any action or claim for damages for personal injuries or for property damages or for death or loss of services resulting from personal injuries or in connection with any claim in condemnation or change of grade proceedings accepts a retainer or enters into an agreement express or implied, for compensation for services rendered or to be rendered in such action, claim or proceeding, whereby his compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof, shall, within thirty days from the date of any such retainer or agreement of compensation, sign personally and file with the Judicial Conference of the State of New York a written statement of such retainer or agreement of compensation, containing the information hereinafter set forth. Such statement may be filed personally by the attorney or his representative at the main office of the Judicial Conference in the City of New York, and upon such filing he shall receive a date stamped receipt containing the code number assigned to the original so filed . . .

(2) Closing Statement: statement where no recovery.

(a) A closing statement shall be filed in connection with every claim, action or proceeding in which a retainer statement is required, as follows: Every attorney upon receiving, retaining or sharing any sum in connection with a claim, action or proceeding subject to this rule shall, within fifteen days after such receipt, retention or sharing, sign personally and file with the Judicial Conference and serve upon the client a closing statement as hereinafter provided. Where there has been a disposition of any claim, action or proceeding or a retainer agreement is terminated, without recovery, a closing statement showing such fact shall be signed personally by the attorney and filed with the Judicial Conference within thirty days after such disposition or termination. Such statement may be filed personally by the attorney or his representative at the main office of the Judicial Conference in the City of New York and upon such filing he shall receive a date stamped receipt . . .

(6) Preservation of records of claims and actions.

Attorneys for both plaintiff and defendant in the case of any such claim or cause of action shall preserve, for a period of at least five years after any settlement or satisfaction of the claim or cause of action or any judgment thereon or after the dismissal or discontinuance of any action, the pleadings and other papers pertaining to such claim or cause of action, including, but not limited to, letters or other data relating to the claim of loss of time from employment or loss of income; medical reports, medical bills, X-ray reports, X-ray bills; repair bills, estimates of repairs; all correspondence concerning the claim or

cause of action; and memoranda of the disposition thereof as well as canceled vouchers, receipts and memoranda evidencing the amounts disbursed by the attorney to the client and others in connection with the aforesaid claim or cause of action.

Order of the Appellate Division, First Department, February 3, 1959:

Pursuant to the provisions of Section 90 of the Judiciary Law and in the exercise of the inherent powers of this court the Justices of the Appellate Division of the Supreme Court in and for the First Judicial Department do hereby

Order a continuous examination and study of the Statements of Retainer and Closing Statements filed with the Appellate Division in the First Judicial Department, pursuant to the applicable rules of this court, for the following purposes: 1. Compilation and interpretation of relevant statistics and data; 2. Observation, consideration and, where necessary, correction of the professional conduct of attorneys and those employed by them or associated with them in any manner whatever in representing either plaintiffs or defendants or their indemnitors, insurers, subrogors, or subrogees in those actions in which such statements are required to be filed by the rules of the court; and it is further

Ordered that this examination and study shall continue until further order of this court; that the same be conducted under the supervision of the Presiding Justice of this court by such employees of this court and of the Supreme Court in and for the First Judicial Department as he may designate and by the members of the Co-ordinating Committee on Discipline and such members of the Griev-

ance Committee of the Association of the Bar of the City of New York, the Committee on Discipline of the New York County Lawyers Association and the Grievance Committee of the Bronx County Bar Association as may be designated and it is further

Ordered that all subpoenas issued by the Clerk of this court in connection with this examination and study be made returnable at the Courthouse of the Appellate Division in and for the First Judicial Department at 25th Street and Madison Avenue, New York, New York, or at the office of the Association of the Bar of the City of New York, the New York County Lawyers Association or the Bronx County Bar Association or such other places as may be designated by the Presiding Justice of this court, and that all examinations and hearings be held at said places or such other places as may be designated by the Presiding Justice of this court, and it is further

Ordered that all pertinent records, papers and documents filed in this court shall be available for the purpose of this examination and study.

Dated, New York, February 3, 1959.

BERNARD BOTEIN
Presiding Justice

CHARLES D. BREITEL
MARTIN M. FRANK
JAMES B. M. MCNALLY
FRANCIS L. VALENTE
HAROLD A. STEVENS
Associate Justices

Revised Rules of the Supreme Court of the United States, Adopted April 12, 1954, Effective July 1, 1954, as amended through June, 1964.

Rule 8—Disbarment:

> Where it is shown to the court that any member of its bar has been disbarred from practice in any State, Territory, District, Commonwealth, or Possession, or has been guilty of conduct unbecoming a member of the bar of this court, he will be forthwith suspended from practice before this court. He will thereupon be afforded the opportunity to show good cause, within forty days, why he should not be disbarred. Upon his response to the rule to show cause, or upon the expiration of the forty days if no response is made, the court will enter an appropriate order; but no order of disbarment will be entered except with the concurrence of a majority of the justices participating.

New York Civil Practice Law and Rules, Section 2304:

> §2304. Motion to quash, fix conditions or modify. A motion to quash, fix conditions or modify a subpoena shall be made promptly in the court in which the subpoena is returnable. If the subpoena is not returnable in a court, a request to withdraw or modify the subpoena shall first be made to the person who issued it and a motion to quash, fix conditions or modify may thereafter be made in the supreme court. Reasonable conditions may be imposed upon the granting or denial of a motion to quash or modify.

Statement of Facts

On January 13, 1966, pursuant to New York Judiciary Law, Section 90, the Appellate Division of the Supreme Court of the State of New York, First Department, ordered the petitioner disbarred and his name struck from the roll of attorneys and counselors-at-law, effective February 14, 1966.

The inquiry which led to petitioner's disbarment began with a complaint from one Abraham Gelman, received by the Committee on Grievances of the Association of the Bar of the City of New York. On September 12, 1963, the Committee on Grievances referred the matter to respondent for further action.

Gelman was interviewed by a member of respondent's legal staff on September 23, 1963. Shortly thereafter, on October 3, 1963, respondent sent petitioner a letter advising him of its investigation and requesting him to appear before the respondent on October 29, 1963.

On the latter date, petitioner appeared in person and requested an adjournment of the proceeding, which was granted.

Thereafter, on or about December 9, 1963, respondent served a subpoena duces tecum upon petitioner directing that he appear with certain of his specified records on January 10, 1964.

After a number of adjournments at petitioner's request, he appeared and testified before the respondent on February 28, 1964. In addition to his appearance on February 28th, the petitioner testified before the respondent on March 24, 1964, and on both occasions was accompanied

by counsel, a former assistant district attorney for New York County. A total of 167 pages of testimony was taken and 54 exhibits were marked for identification during petitioner's appearances.

At the close of the March 24th hearing, petitioner's counsel asked for time to read the minutes of his client's testimony so that he might submit additional clarifying data if he deemed it necessary. Petitioner was advised that the minutes of the proceeding were available to him. However, neither petitioner nor his attorney thereafter requested an opportunity to inspect them, whereupon the respondent, by letters dated April 8, 16 and 21, 1964, asked petitioner's counsel whether he intended to supply any additional clarifying data. Neither petitioner nor his counsel replied to the respondent's queries nor did either accept the respondent's offer to make a copy of the minutes of March 24th available for inspection.

As part of its preliminary inquiry, the respondent also questioned witnesses under oath. It also introduced documents submitted by such witnesses, the files of various insurance companies, and statements of retainer or closing statements filed with the Judicial Conference of the State of New York, pursuant to Rule IV(1)(a) and (2)(a) of the Special Rules of the Appellate Division, First Department, Regulating the Conduct of Attorneys. This is the evidence, together with the testimony given in the preliminary investigation by petitioner himself, which was offered or sought to be offered by trial counsel for the respondent before the referee, for the purpose of sustaining the charges brought in the Appellate Division.

Throughout the preliminary inquiry, petitioner sought to impress everyone with his often-stated desire to cooperate

to the fullest with the investigation. On October 29, 1963, on the occasion of his first appearance before the respondent, the petitioner stated "I haven't even the slightest compunction of conscience about giving you information . . . I will answer your questions" (CC 11*). When the petitioner returned on February 28, 1964, in the company of counsel, his first statement apprised the respondent that he had attempted to abide by the subpoena of the respondent with "celerity" and "dispatch." His counsel stated that, "We are here to do what we can do to comply with the subpoena and the requests of the Committee. Now, let us get on" (CC 19, 20, 21). On his last appearance before the respondent on March 24, 1964, petitioner advised that he had brought with him whatever was subject to the subpoena and more "so as to refresh my recollection" (CC 99).

Additional assurances of petitioner's intention to cooperate with the inquiry are noted: "I want to comply with the subpoena" (CC 87); "Adjourn the case for a month, and I will get everything together" (CC 88); "I will produce the checkbooks, the files. I'll show you every paper that I have in my case" (CC 89).

At no time during the preliminary inquiry did the petitioner invoke any privilege either under the New York State or the United States Constitution. During this same period, no objection was raised to the service of a subpoena upon petitioner, nor was any challenge made to its scope.

On May 12, 1964, respondent filed a petition charging the petitioner with nine substantive acts of misconduct, based upon the evidence adduced in its preliminary inquiry. These included charges of "farming out" of negli-

* References are to testimony before the Co-ordinating Committee.

gence cases, conversion of clients' funds, compromising infants' claims without court orders, failure to file statements of retainer and closing statements, failure to maintain a special account, and harboring a disbarred lawyer.

The petitioner's answer of July 22, 1964, generally denied the charges and alleged that the entire proceeding was based on illegally obtained evidence taken from his law office with respondent's knowledge. Petitioner further alleged that he appeared before the respondent in order to avoid any charge of contempt or lack of cooperation and therefore, that his appearance could not be construed as a waiver of his constitutional rights.

Allegation number nine of petitioner's answer of July 22, 1964, contains his first assertion of any right guaranteed under either federal or state constitutions:

> "9. That your respondent has never waived his constitutional privileges as a citizen, and hereby invokes the rights, privileges and immunities afforded to him as a citizen under the Bill of Rights; under Article 14 of the United States Constitution, and under Article 1, Section 6, of the State Constitution, and all other provisions therein, whereby citizens are protected and safeguarded against the invasion of their constitutional rights against self-incrimination and against the unlawful search and seizure of private papers and other information without a search warrant having been duly obtained."

Upon the Court's appointment of a referee to hear the evidence and report thereon, the respondent noticed the proceeding for trial on September 29, 1964. However, on September 21, 1964, before the appointed trial date, peti-

tioner moved the Appellate Division for an order suppressing evidence allegedly developed by the respondent in its preliminary investigation and for other relief. In its affidavit of September 30, 1964, the respondent, through its counsel, denied that any evidence had been illegally obtained or used in its proceeding against petitioner and furnished the Court with a chronology of the events underlying the inquiry which clearly set forth the genesis of the inquiry and the sources of information relied upon by respondent, thereby demonstrating that no evidence was obtained improperly.

On October 29, 1964, the Appellate Division denied petitioner's motion in all respects.

Hearings before the referee were held on January 27, 28, February 3, March 22, 25, and April 5, 7, 21, 26, 1965.

During the hearings, respondent sought to offer in evidence petitioner's entire testimony before the respondent. Petitioner objected to this offer on the grounds that it had been illegally obtained and that he had been coerced into giving testimony before the respondent.

The referee admitted those statements made by petitioner before the respondent which constituted admissions against interest.

Petitioner refused to testify on his own behalf, invoking the constitutional privileges raised in his answer to the petition. Petitioner again objected to the introduction in evidence of documents he alleged had been stolen, but did not offer any proof in support of his objection.

The referee's report of July 23, 1965, sustained most of the charges against petitioner, and upon its issuance, the

petitioner applied for an order remanding the proceeding to the referee for the purpose of receiving in evidence his entire testimony before respondent or, in the alternative, directing that all of petitioner's aforesaid testimony be incorporated in the record before the Appellate Division and permitting the parties to file supplemental briefs.

In support of his application, petitioner's affidavit of October 21, 1965, swore:

> ". . . that certain purely formal positions I took in the course of this case in terms of the privilege against self incrimination have not as a practical matter involved me in any such privilege-grounded refusal to give information about myself since I did testify fully and freely and answered all questions before the Coordinating Committee knowing that such would be admissible in evidence against me in any subsequent disciplinary hearing as extra-judicial admissions. In any event, if anyone should deem that there does still lurk in this record some connotation that I, as a lawyer, have 'taken the Fifth Amendment' in a professional inquiry concerning my own fitness to practice, the granting of the within motion to incorporate my full Coordinating Committee testimony into this record before the Referee and before this Court would be of value to my cause as constituting an amends by me for any such possible 'Fifth Amendment' impact of my prior purely formal references to the privilege against self incrimination. And while it is true that I did not testify in the Referee hearings, that was only because at that stage I was still concerned with preserving the formalities of my constitutional claim concerning self incrimination, and it did not occur by way

of refusal on my part to take the stand at the request of the petitioners herein or of the Referee or in defiance of any subpoena . . . "

Respondent, at the same time, moved to confirm that portion of the report which sustained the charges and to disaffirm that portion which failed to sustain certain charges.

Petitioner's motion was denied while respondent's was granted in its entirety, all of the charges against petitioner having been found sustained.

POINT I

The privilege against self-incrimination does not extend to statements which may merely subject an attorney to disciplinary action.

Recognizing the fact that a defense of the charges made against him in the disciplinary proceeding could not conceivably require him to incriminate himself in the conventional sense, petitioner here seeks to broaden the protection against self-incrimination by claiming that the privilege encompasses statements which might tend to subject him to professional discipline (petitioner's Point I).

The Constitution of the United States, Amendment V, provides in part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . "

The privilege by its very terms is limited to situations in which an individual is forced to give evidence which would connect him to the commission of a crime or might result in his being charged with a crime. It does not give the individual the right to refuse to answer questions of

any kind or in any context which might have unfavorable consequences to him other than incrimination.

This distinction is clearly demonstrated in situations where an attorney testifies before a grand jury investigating a crime pursuant to a grant of immunity.

For example, in a bribery investigation, the client of an attorney may testify that he delivered to his attorney a quantity of money with the understanding that it would be paid to a public official. The attorney might testify before the grand jury under the grant of immunity, and fully admit his complicity in this scheme. He could not thereafter be indicted for the crime of bribery but he could, nevertheless, clearly be subject to disciplinary proceedings for conduct unbecoming a member of the Bar.

This Court has recognized that the privilege against self-incrimination does not encompass statements which might subject an attorney to disciplinary action. Thus, its rules provide that where its attention has been drawn to circumstances which might warrant the imposition of discipline upon a member of its Bar, it will order such attorney to show cause why disciplinary action should not be imposed (Revised Rules of the Supreme Court of the United States, Rule 8). Such a procedure is inconsistent with the view that a disciplinary proceeding is in any sense criminal in nature (and therefore encompassed within the privilege) since, in effect, it requires "the defendant" to come forward with his explanation.

Carried to its logical conclusion, petitioner's argument that the Fifth Amendment privilege applies to statements which might result in disciplinary action, would result in forcing the Appellate Division to certify the admitted briber in our example above, as an attorney in good standing, licensed to practice as an officer of the Courts.

The nature of a disciplinary proceeding has been discussed at length by almost every state court having jurisdiction over its attorneys. Many state courts have held that such proceedings are civil in nature, *In re Chernoff*, 26 A. 2d 335, 344 Pa. 527; *In re Harrell*, 23 So. 2d 92, 156 Fla. 327; *In re Elton*, 152 N. E. 2d 850, 14 Ill. 2d 338; *In re Pennica*, 177 A. 2d 721, 36 N. J. 401; *In re Lieberman*, 125 N. E. 2d 328, 163 Ohio St. 35; *Attorney General* v. *Lane*, 243 N. W. 6, 259 Mich. 283, cert. denied; *Lane* v. *Voorhies*, 53 S. Ct. 115, 287 U. S. 654, 77 L. Ed. 565.

It has been held that proceedings for the disbarment or suspension of attorneys are judicial proceedings and not criminal proceedings, *In re Gladstone*, D. C. N. Y. 28 F. Supp. 858; *Doe* v. *Rosenberry*, C. A. N. Y. 255 F. 2d 118; *Phipps* v. *Wilson*, C. A. Ill. 186 F. 2d 748. The New York Court of Appeals has called an inquiry into the conduct of an attorney a quasi-administrative remedy, *People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465.

The cases cited by petitioner in support of his contention that the Fifth Amendment applies to disciplinary proceedings all relate to criminal matters. *Boyd* v. *United States*, 116 U. S. 616, and *Lees* v. *United States*, 150 U. S. 476, were actions in which the answers to certain questions asked of the individuals involved might have clearly tended to incriminate them. In addition, the individuals who were subjects of suit in *Boyd* and *Lees* protested the production of the records sought by the government in each case and asserted the privilege against self-incrimination at the outset. This aspect of the instant matter will be discussed under a separate point dealing with petitioner's waiver of his Fifth Amendment privilege.

Cummings v. *Missouri*, 4 Wall. 277, and *Ex Parte Garland*, 4 Wall. 333, both involved statutes which were clearly penal in nature. Contrary to petitioner's assertion, it is obvious upon close review of the law that the cases cited are irrelevant to the issue here and hardly persuasive for the proposition that disbarment is "within the compass of the Fifth Amendment's . . . protection."

The vitality of *Cohen* v. *Hurley*, 366 U. S. 117, is currently being challenged by *Spevack* v. *Klein*, No. 944, October Term, 1965. Both Cohen and Spevack invoked their constitutional rights against self-incrimination in the traditional way. In each case, the attorney advised the Court that his answers might lead to possible criminal prosecution. Here, petitioner admits that it is only disbarment he fears, not criminal prosecution.

POINT II

Assuming, *arguendo*, that the privilege against self-incrimination was applicable herein, petitioner waived his claim thereto.

Even if it were held that the Fifth Amendment privilege extended to questions, the answer to which might subject the attorney to possible disciplinary proceedings, the record amply supports the contention that petitioner waived the privilege in testifying before the respondent.

The record before the respondent is replete with petitioner's assurances that he intended to cooperate with the inquiring body to the fullest extent. Respondent has already catalogued some of petitioner's statements of intention in the chronology of facts above.

Petitioner did not challenge the issuance of the subpoena lawfully served upon him on December 9, 1963. In fact, he appeared before respondent with his attorney, in compliance thereto and testified fully while invoking no privilege at any time. Petitioner cannot be heard now to say that he was coerced into testifying. Not until he interposed his answer to the charges did petitioner raise the issue of privilege and coercion, many months after he had testified at length.

With respect to the questioned subpoena, petitioner failed to avail himself of his lawful remedy under Section 2304 of the New York Civil Practice Law and Rules, which provides for a motion to vacate or quash a subpoena. Thus petitioner might have validly tested the propriety of the subpoena's issuance or the relevancy and materiality of the documents sought to be produced. He failed to do so.

Petitioner's conduct before the respondent with reference to his testimony and his failure to challenge the subpoena clearly constitutes a waiver of his privilege under the Fifth Amendment to the United States Constitution.

The cases cited by petitioner in support of his contention that the use of portions of his Committee testimony before the referee violated his Fifth Amendment rights are not relevant to the issue presented here. *Wan* v. *United States,* 266 U. S. 1, *Bram* v. *United States,* 168 U. S. 532 and the recently decided *Miranda* v. *Arizona,* No. 759, October Term, 1965, stand for the principle that involuntary confessions are inadmissible in criminal proceedings.

This Court's recent decisions in the field of criminal law relate more particularly to the right of a suspect to remain silent during a period of custodial interrogation. The

Court has addressed its attention to the effect of private, police interrogation upon the emotional state of the suspect who may be accused of a crime. *Miranda* dealt at length with the individual's immediate right to counsel in order to protect his rights under the Fifth Amendment. Here, petitioner was fully represented by counsel at all stages of the proceeding.

Another distinction between petitioner's matter and the cases of *Cohen* v. *Hurley, supra,* and *Spevack* v. *Klein, supra,* is noted: Unlike the instant case, both *Cohen* and *Spevack* involve absolute refusals to testify before the disciplinary agency. In neither case did the respondent testify willingly before the body conducting the inquiry, nor did the subject attorney comply with the directions of a subpoena duces tecum lawfully served.

Petitioner's application to the Appellate Division which sought an order directing the reception in evidence of his entire Committee testimony constitutes an additional waiver of his Fifth Amendment privilege.

Petitioner's notice of motion dated October 20, 1965, returnable October 22, 1965, was supported by his affidavit sworn to October 21, 1965. A portion of the affidavit has been set forth in the statement of facts herein. Petitioner characterizes his assertion of the privilege against self-incrimination as a "purely formal position," further advising the Court that he testified "fully and freely and answered all questions . . . knowing that such would be admissible in evidence against me in any subsequent disciplinary hearing as extra-judicial admissions." Petitioner clearly advised the Court of his desire to wipe away any "connotation" that he had "taken the Fifth Amendment in

a professional inquiry concerning my own fitness to practice..."

At the time petitioner made the above application, he was adequately represented by counsel of his own choice.

In addition, it is noted that petitioner, in his answer of July 22, 1964, to the petition, generally denied the allegations contained in the charges against him. In thus addressing himself to the merits of the case, it is submitted that petitioner waived his rights under the Fifth Amendment.

Petitioner's posture with regard to the use of his Committee testimony might well be summarized at this point:

> Before the referee, the respondent sought to introduce petitioner's entire testimony, which offer met with petitioner's vigorous objection. The respondent then offered portions of the testimony as admissions against interest.
>
> The petitioner then sought to have the proceeding reopened so that his entire testimony might be incorporated into the record. Thus, in his first about-face, petitioner attempted to obtain the result which would have been the fact, but for his own opposition to the respondent's offer of proof before the referee.
>
> Now comes the petitioner before this Court with his newest about-face. He contends that his testimony before respondent, which he sought to exclude before the referee, but which he prayed to have set forth in its entirety before the Appellate Division, is the product of an unconstitutional deprivation of his rights.

It is submitted that petitioner's privilege against self-incrimination cannot thus be turned on and off.

POINT III

Assuming, *arguendo*, that petitioner's invocation of the privilege against self-incrimination was proper and timely, his disbarment was not precluded thereby.

By virtue of a license granted by the State, petitioner has been given the status of attorney and permitted to exercise the rights flowing therefrom. Simultaneously with the issuance of the license, the State imposed by law, certain responsibilities upon the licensee. In the case of an attorney, these include the obligation to accept assignment to represent indigent defendants without compensation and the status and responsibility of an officer of the Court, including the requirement to maintain certain records in contingent fee cases [Special Rules, Rule IV (1)(a), (2)(a) and (6)] and to make them available to the Appellate Division upon request. The latter requirement is not only reasonable upon its face, but is mandated by long history and experience with the contingent fee.

The five counties of New York City are located in the First and Second Judicial Departments of New York. In January of 1928, the Appellate Division, First Department, was presented with a petition of the three major bar associations of the Department, requesting the Court to order an investigation into the conduct of attorneys engaged in "ambulance chasing," *In re Association of the Bar of the City of New York*, 222 A. D. 580, 227 N. Y. Supp. 1. Shortly thereafter, a similar petition was presented to the Appellate Division, Second Department, by the Bar Associations of Kings and Queens Counties, and that Court also ordered an investigation. In its order, the Court stated:

> "[If] the calendars of the court have been congested by causes tainted with corrupt practices appropriate court rules may be adopted according to law, . . . which will bring this condition of affairs to a speedy end and prevent a recurrence thereof." *In re Brooklyn Bar Association*, 223 A. D. 149, 227 N. Y. Supp. 666.

The authority of the First Department to conduct such an investigation and to compel an attorney to testify was promptly challenged and vindicated in *People ex rel. Karlin* v. *Culkin, supra.* In that decision, Judge Cardozo recited the evils that the investigation was designed to uproot:

> "'Ambulance chasing' was spreading to a demoralizing extent. As a consequence, the poor were oppressed and the ignorant overreached. Retainers, often on extravagant terms, were solicited and paid for. Calendars became congested through litigations maintained without probable cause as weapons of extortion."

As a result of the disclosures of the 1928 investigations, the Appellate Division, First and Second Departments, each promulgated special rules designed to closely regulate the practice. The rules, by their terms, were directed at those attorneys who chose to practice in the area of personal injury claims on a contingent fee basis.

In spite of these rules, this area of practice has been the source of recurrent abuses and scandals, and in succeeding investigations, many attorneys have been disciplined and a number have been convicted of felonies.

Accordingly, the Appellate Division, First and Second Departments, found it necessary to promulgate a rule regu-

lating the size of the contingent fee which an attorney may lawfully exact in a particular case. The authority of the Department was once more challenged and once again vindicated, *Gair* v. *Peck*, 6 N. Y. 2d 97, cert. den. and app. dism., 361 U. S. 374:

> "The duty of the Appellate Divisions to keep the house of the law in order, does not hinge upon whether clients, worn down by injuries, delay, financial need and counsel holding the purse strings of settlement, knowing little about law or lawyers, have had the stamina to resist in Court by hiring other lawyers to be paid out of the other half of the recovery for defending against the first lawyer .... In this one Judicial Department, over 60% of the 150,000 contingent fee agreements filed each year provide that 50% of the recovery shall be paid to the lawyer ..."

Reliance upon the complaints of clients did not provide an effective means for containing and remedying the abuses inherent in the contingent fee system. Thus the client was often unaware of his rights and fearful of the consequences attendant upon his making a complaint against his attorney. Consequently, on February 3, 1959, the Appellate Division, First Department, created by order, the Co-ordinating Committee on Discipline of the Association of the Bar of the City of New York, the New York County Lawyers' Association, and the Bronx County Bar Association, the respondent herein, for the purpose of conducting a continuing inquiry in this area. The Committee was given the power of subpoena, the right to question witnesses under oath, and the right to require attorneys to produce their files and records which the rules require them to maintain.

In the light of these circumstances, the "record-keeping" requirements and the obligation of an attorney to provide relevant information is a proper and indeed necessary exercise of the supervisory power vested in the Courts.

Absent any constitutional question, the prerogative of the State to attach reasonable requirements to the issuance and maintenance of a license creating rights in a licensee, cannot be challenged. It is now contended that where the failure of the licensee to fulfil such reasonable requirements attendant upon his license is predicated upon the privilege of self-incrimination, the requirements of the State are nullified and the State compelled to continue the license in full force despite such failure. Such a conversion of the privilege against self-incrimination from a shield into a sword, striking down otherwise proper provisions of law, is not only unwarranted, but would effectively destroy the administrative process.

Such a conversion of the privilege against self-incrimination would not only require the Appellate Division to continue to certify petitioner as an attorney in good standing despite his refusal to comply with the requirement that he produce records concerning his conduct as an attorney, but would also (1) require the State to continue to keep in force a license to an individual to carry a concealed weapon despite that individual's refusal to answer the question, upon periodic application for renewal, "For what purpose do you intend to use the weapon?", upon the ground that to do so would tend to incriminate him; (2) require the State to keep in force a driver's license to an individual despite that individual's refusal to answer the question, upon periodic application for renewal, "Have you ever been involved in an accident resulting in fatalities?", upon

the ground that to do so would tend to incriminate him, and (3) prohibit a court from removing a trustee of funds appointed by it who refused to account on the ground that to do so would tend to incriminate him.

This Court, has already rejected the contention that the privilege against self-incrimination not only protects an individual from direct compulsion to answer incriminating questions, but also immunizes him from the consequences of failing to perform duties otherwise required of him by law. Thus, in the so-called "loyalty cases" (*Beilan* v. *Board of Education,* 357 U. S. 399, *Lerner* v. *Casey,* 357 U. S. 468, and *Nelson* v. *County of Los Angeles,* 362 U. S. 1) the Court recognized the right of the State to terminate the professional status granted by it to individuals where they refused, on the grounds of the privilege against self-incrimination, to respond to inquiries there held to be reasonably related to such status. Even in *Slochower* v. *Board of Education,* 350 U. S. 551, cited by petitioner, the Court recognized this principle where it stated (at p. 558):

> "It is one thing for the city authorities themselves to inquire into Slochower's fitness, but quite another for his discharge to be based entirely on events occurring before a federal committee whose inquiry was announced as not directed at the property, affairs, or government of the city. . . ."

These cases have been criticized, not for the underlying principles enunciated therein, but because there is some doubt as to whether inquiries concerning past political affiliation were relevant to the professional status there involved. In the instant matter, no such doubt exists, for the inquiry was directly related to petitioner's conduct as an attorney pursuant to license issued to him by the State.

POINT IV

None of the evidence herein was improperly obtained.

The disciplinary proceeding which resulted in petitioner's disbarment was not based upon information obtained through the theft of his files.

There is no finding of fact as regards the "purloined document" issue. Simply and frankly stated, petitioner manufactured a straw man—the "theft" of his files—and submitted no proof to support his charge that the respondent was the beneficiary of the proceeds of a theft. The fact is that petitioner's charges have no evidentiary support.

The genesis of respondent's inquiry has been set forth at length. Petitioner argues that certain evidence obtained by respondent should have been suppressed as being violative of the Fourth Amendment. Petitioner's references to "stolen papers" are totally without authority. The so-called theft of petitioner's files is not worthy of consideration since it is completely unsubstantiated by any evidence whatsoever, and merely calculated to becloud the real issue—petitioner's misconduct and consequent unfitness for the practice of law.

Assuming, *arguendo,* that petitioner's files were stolen by a former associate of his, respondent's use of such files and records would, nevertheless, not be improper under the doctrine of *Burdeau* v. *McDowell,* 256 U. S. 465.

In this landmark decision, the Court held that the federal government had a right to maintain custody of certain incriminating documents which had been turned over to the Justice Department by private citizens. These individuals

had obtained the documents by a wrongful search of the owner's private office without the participation or knowledge of any government official.

In determining the right of the government to use these stolen documents as evidence in a criminal prosecution against their owner, the Court stated (256 U. S. at 475):

> "The Fourth Amendment gives protection against unlawful searches and seizures, and . . . its protection applies to governmental action . . . it was intended as a restraint upon the activities of sovereign authority and was not intended to be a limitation upon other than governmental agencies; as against such authority it was the purpose of the Fourth Amendment to secure the citizen in the right of unmolested occupation of his dwelling and the possession of his property, subject to the right of seizure by process duly issued."

In *Burdeau*, the fact that evidence had been unlawfully seized by private individuals was beyond question. Safes were blown apart and desks forced open. In the instant matter, no unlawful search or seizure has been found to have occurred.

Petitioner cites *McNabb* v. *United States*, 318 U. S. 332, to support his argument for suppression. In an effort to connect *McNabb* with the issue raised by petitioner's fourth point, he has selected a portion of *McNabb* and placed it out of context. Petitioner, citing *McNabb*, states (page 15 of his petition):

> "The use as evidence of these stolen papers or the fruits of their disclosure cannot be upheld 'without making the Courts themselves accomplices in willful disobedience of law.'"

In fact, however, *McNabb* was concerned with the admissibility of confessions in the federal Courts when federal officers failed to promptly arraign defendants accused of a crime.

Shelley v. *Kramer*, 344 U. S. 1, *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, and *Bell* v. *Maryland*, 378 U. S. 226, which are also cited by petitioner to support his suppression argument are just as irrelevant to the issue as is *McNabb*. These three cases construe the Fourteenth Amendment's equal protection clause and involve state enforcement of discriminatory acts committed by individuals.

United States v. *Price*, 383 U. S. 787, and *United States* v. *Guest*, 383 U. S. 745, are clearly inapplicable here. These are cases arising in Mississippi and Georgia which construe the 1865 and 1964 Civil Rights Acts against persons who deprive any citizen of his civil rights.

Mapp v. *Ohio*, 367 U. S. 643, *Elkins* v. *United States*, 364 U. S. 206, and *Rea* v. *United States*, 350 U. S. 214, all refer to criminal matters in which evidence was illegally obtained by state officers. They fail to enhance the strength of petitioner's argument since he has never alleged that agents or employees of respondent have illegally seized his papers, and these three cases patently refer to state action. See also: *Linkletter* v. *Walker*, 381 U. S. 618, 636, in which this Court, in denying retroactivity to *Mapp*, held that all of the cases since *Wolf* v. *Colorado*, 338 U. S. 25, have been based on the necessity for an effective deterrent to police action.

POINT V

Petitioner's rights to due process were scrupulously protected.

Petitioner was not denied his rights under the due process clause of the Fourteenth Amendment.

Contrary to petitioner's assertion, there was nothing "sordid" about the manner in which the inquiry began. The allegations of "extortion" and "stolen documents" are not issues, since no evidence was adduced to support either charge.

Neither can it be contended that petitioner was "coerced" into testifying. He freely testified before the respondent without raising any constitutional questions and never challenged the issuance of a subpoena upon him. Assuming he had a right to assert his Fifth Amendment privilege, he effectively waived it as discussed above.

Petitioner complains that the referee refused to consider certain explanatory testimony which he sought to have received in evidence. Petitioner refers (petition, page 5) to pages 859 to 867 of the transcript of testimony before the referee. A review of this testimony indicates a proper refusal by the referee to receive in evidence the testimony of one Nathaniel Rankow, given before the respondent.

Respondent's trial counsel properly objected to its reception upon the ground that it was not a legal substitute for the live testimony of the witness, who would thereafter be subject to cross-examination. The referee, giving petitioner every leeway, excluded the testimony on proper state grounds.

Petitioner's assertion that the disciplinary proceeding violated the fundamental fairness standard of the due process clause of the Fourteenth Amendment is without merit. Apart from the substantive allegations already discussed, the procedures followed by the respondent were adopted to safeguard the rights of attorneys:

(1) Petitioner was given written notice of the investigation of his practice prior to the interrogation of any witnesses (other than the original complainant) by respondent.

(2) The investigation concentrated on closed accident cases.

(3) The petitioner was granted the privilege of being represented by counsel of his own choice when he was questioned during the preliminary investigation, and his counsel was present and participated in petitioner's hearings, even though this Court has held in *Matter of Anonymous 6 and 7* v. *Baker*, 360 U. S. 287, that in a preliminary investigation such as this, which is analogous to a grand jury investigation, counsel for an attorney may not be present in the hearing room during the interrogation.

(4) Witnesses other than petitioner who were questioned during the preliminary investigation of petitioner's professional conduct were granted the right of counsel.

(5) Petitioner was permitted to obtain a copy of the transcript of his testimony given in the preliminary investigation.

(6) Petitioner had his full day in court in the hearing before the referee, where he was confronted with the witnesses who testified against him and was given the fullest opportunity to cross-examine these witnesses.

In *Ex Parte Wall*, 107 U. S. 265, this Court, discussing the nature of a disciplinary proceeding, stated (at pp. 288, 290):

> "The power to do this [impose discipline for professional misconduct] is a rightful one; and, when exercised in proper cases, is no violation of any constitutional provision.
>
> * * * * *
>
> "We have seen that, in the present case, due notice was given to the petitioner, and a trial and hearing was had before the court, in the manner in which proceedings against attorneys, when the question is whether they should be struck off the rolls, are always conducted.
>
> * * * * *
>
> ". . . the action of the court in cases within its jurisdiction is due process of law."

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: August 25, 1966

Respectfully submitted,

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Attorney for Respondent

MICHAEL FRANCK,
PETER J. O'CONNOR
On the Brief

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

KAYE *v.* CO-ORDINATING COMMITTEE ON DISCIPLINE OF ASSOCIATION OF BAR OF CITY OF NEW YORK, ETC.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT.

No. 300. Decided February 13, 1967.

PER CURIAM.

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the Appellate Division of the Supreme Court of New York, First Judicial Department, for reconsideration in light of *Spevack* v. *Klein*, 385 U. S. 511.

MR. JUSTICE CLARK, MR. JUSTICE HARLAN, and MR. JUSTICE STEWART would affirm the judgment below for the reasons stated in the dissenting opinions of MR. JUSTICE HARLAN in *Spevack* v. *Klein*, 385 U. S. 520, and *Garrity* v. *New Jersey*, 385 U. S. 500.

MR. JUSTICE WHITE dissents for the reasons stated in his dissenting opinion in *Garrity* v. *New Jersey*, and *Spevack* v. *Klein*, 385 U. S. 530.